Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-01–205–2009

B

SYED AHMAD HELMY, ABDUL WAHAB PATAIL AND ABDUL AZIZ ABD RAHIM JJCA

8 JULY 2013

C

Civil Procedure — Appeal — Appeal against judgment of the High Court — Preliminary objection — Acquisition of land to build road — Appeal against decision of the High Court in dismissing application to obtain order of certiorari to quash decision of land administrator — Whether application made within time frame under O 53 of the Rules of the High Court 1980 — Whether proper party named — Land Acquisition Act 1960 s 3(1)(a)

D

This was an appeal against the decision of the High Court in dismissing the appellant's application for judicial review and to obtain an order of certiorari to quash the decision of the land administrator to acquire a part of the appellant's land under s 3(1)(a) of the Land Acquisition Act 1960 ('the Act'). In 1994, the second respondent wished to build a hotel on a piece of land and applied to the land administrator to acquire part of the appellant's land. After two unsuccessful applications to acquire the said land, unknown to the appellant, the second respondent made a third attempt and this time, by declaring that it was required for a public purpose under s 3(1)(a) of the Act. Form D was published in the *gazette* but was not served nor notified to the appellant. Subsequently, the appellant was served with Form E to attend a land inquiry by the land administrator. The appellant protested but was served with Form H, two years and four months after the declaration in Form D was *gazetted*. Form H constituted the first respondent's decision to reject the appellant's request that the acquisition be stayed or withdrawn and to proceed with the acquisition by making the award. The appellant then applied for judicial review in the High Court against the first respondent's decision. During the hearing of the application, the second respondent raised two preliminary objections against the application, submitting that the application was not made within time as prescribed by O 53 of the Rules of the High Court 1980 ('RHC'); and the proper party, which was the state authority, was not named as a party. Hence, the present appeal against the preliminary objections raised in the High Court.

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Held, dismissing the appeal:

(1) The High Court did not err in sustaining the preliminary objection. The appellant's grievance was not so much on the award itself but the

acquisition. The objection by the appellant, at all times, was in respect of the acquisition of its land, not the quantum of the award itself (see paras 9–10).

(2) Since it was a decision to acquire that was challenged, the challenge was against the decision of the state authority, by virtue of s 8 of the Act. Since the Act is, subject to compensation, the legislation that empowers a state authority to deprive a person of his property, its provisions must be adhered to strictly. If a power is stated to be with the state authority, it could not be exercised by another. An action could not be taken against another for the exercise of its power by the state authority. The Act only provides that the land administrator acts upon the decision of the state authority to hold inquiry for the hearing of claims to compensation for all interests in such land. An action against the decision of the state authority could not name the land administrator (see paras 11–12).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu untuk semakan kehakiman dan untuk mendapatkan perintah certiorari untuk membatalkan keputusan pentadbir tanah untuk mengambil sebahagian tanah perayu di bawah s 3(1)(a) Akta Pengambilan Tanah 1960 ('Akta'). Pada tahun 1994, responden kedua ingin membina hotel atas sebidang tanah dan memohon kepada pentadbir tanah untuk mengambil sebahagian tanah perayu. Selepas dua permohonan tidak berjaya untuk mendapatkan tanah tersebut, tidak diketahui oleh perayu, responden kedua membuat percubaan ketiga dan kali ini, dengan mengisytiharkan ia dikehendaki untuk tujuan awam di bawah s 3(1)(a) Akta. Borang D diterbitkan dalam *warta* tetapi tidak diserahkan atau diberitahu kepada perayu. Kemudiannya, Borang E diserahkan kepada perayu untuk menghadiri siasatan tanah oleh pentadbir tanah. Perayu membantah tetapi diserahkan dengan Borang H, dua tahun dan empat bulan selepas perisytiharan dalam Borang D di*warta*kan. Borang H menjadi keputusan responden pertama untuk menolak permintaan perayu bahawa pengambilan ditangguhkan atau ditarik balik dan untuk meneruskan dengan pengambilan dengan membuat award. Perayu kemudiannya memohon untuk semakan kehakiman di Mahkamah Tinggi terhadap keputusan responden pertama. Semasa pendengaran permohonan tersebut, responden kedua membangkitkan dua bantahan awal terhadap permohonan, menghujahkan bahawa permohonan tersebut tidak dibuat dalam masa yang ditetapkan oleh A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan pihak yang betul, yang mana adalah pihak berkuasa negeri, tidak disebut sebagai suatu pihak. Maka, rayuan ini terhadap bantahan awalan yang dibangkitkan di Mahkamah Tinggi.

Diputuskan, menolak rayuan:

(1) Mahkamah Tinggi tidak tersilap dalam mengekalkan bantahan awalan

tersebut. Rasa tidak puas hati perayu bukan ke atas award itu sendiri tetapi ke atas pengambilan tanah. Bantahan oleh perayu, pada kesemua masa, berkaitan pengambilan tanahnya, bukan kuantum award itu sendiri (lihat perenggan 9–10).

(2) Memandangkan keputusan untuk mengambil tanah yang dicabar, cabaran adalah terhadap keputusan pihak berkuasa negeri, mengikut s 8 Akta. Memandangkan Akta adalah tertakluk kepada pampasan, perundangan yang memberi kuasa kepada pihak berkuasa negeri untuk menafikan seseorang daripada hartanahnya, peruntukan-peruntukannya mesti dipatuhi dengan ketat. Jika kuasa dinyatakan berada dengan pihak berkuasa, ia tidak boleh dijalankan oleh pihak lain. Tindakan tidak boleh diambil terhadap pihak lain untuk pelaksanaan kuasa oleh pihak berkuasa negeri. Akta hanya memperuntukkan bahawa pentadbir tanah akan bertindak atas keputusan pihak berkuasa negeri untuk mengadakan siasatan untuk pendengaran tuntutan kepada pampasan untuk kesemua kepentingan dalam tanah sedemikian. Tindakan terhadap keputusan pihak berkuasa negeri tidak dapat menamakan pentadbir tanah (lihat perenggan 11–12).]

Notes

For cases on appeal against judgment of the High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Cases referred to

Arthur Ponniah Gurubatham & Satu Lagi lwn Pentadbir Tanah Wilayah Persekutuan [2007] MLJU 728; [2008] 3 CLJ 17, HC (refd)

Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor [2013] 2 MLJ 16; [2013] 3 CLJ 649, CA (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 18

Land Acquisition Act 1960 ss 3(1)(a), 8, 8(1), (4), 14(1), 16, Forms D, G, H

Rules of the High Court 1980 O 53, O 53 r 3(6)

Appeal from: Judicial Review Application No 13–01 of 2008 (High Court, Kuala Terengganu)

Bahari Yeow (Lee Hishamuddin Allen & Gledhill) for the appellant.

Noorbahari bin Baharuddin (State Legal Advisor, State Legal Advisor Office) for the first respondent.

Bastian Vendargon (PK Nathan & Gene Vendargon with him) (Bastian Vendargon) for the second respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Kijal Resort Sdn Bhd had applied to the High Court for judicial review and to obtain an order of certiorari to quash the decision of the land administrator to acquire under s 3(1)(a) of the Land Acquisition Act 1960 ('LAA 1960') of part of Lot 3168, Mukim Kijal, Daerah Kemaman, Negeri Terengganu registered in the name of the appellant. The application was dismissed by the High Court.

THE APPEAL AGAINST PRELIMINARY OBJECTIONS

[2] At the hearing, two preliminary objections were raised on behalf of the second respondent:

(a) The application was not made within time under O 53 of the Rules of the High Court 1980; and

(b) The proper party, the state authority, was not named as a party.

THE FIRST PRELIMINARY OBJECTION

[3] Order 53 r 3(6) of the RHC 1980 provides that an application for judicial review shall be made promptly, and in any event, within 40 days from the date when grounds for the application first arose, or when the decision is first communicated to the applicant.

[4] The second respondent submitted that the appellant's application on 6 January 2008 for leave to initiate judicial review was filed more than 40 days after the decision to acquire was *gazetted* on 21 July 2005 in Form D. The appellant responded that its application was not in breach as it was filed within 40 days of Form H which was served only on 27 November 2007.

[5] The critical aspect is whether the 'decision' that is made the subject of the application for leave is

(a) the decision to acquire under s 8 of the LAA 1960*gazetted* on 21 July 2005 in Form D; or

(b) the award under s 16 of the LAA 1960 notice of which was served on 27 November 2007 in Form H.

[6] It is provided by s 8(1) of the LAA 1960 that it is the state authority who makes decisions as to acquisition for a public purpose:

(1) When the State Authority decides that any of the lands referred to in section 7 are needed for any of the purposes referred to in s 3, a declaration in Form D shall be published in the *gazette*.

[7] The publication in the *gazette* is public notice to all persons: see s 18 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989 Act 338). This is the operative provision with regard to the notification of the decision to acquire for a public purpose.

[8] On the other hand, concerning the service of notice on 27 November 2007 relied upon, pertains to the award made. It is provided under s 16 of the LAA 1960 that:

(1) On making any award under sub-s 14(1) in respect of any scheduled land the land administrator shall prepare and serve on each person interested in such land a notice in Form H.

(2) Every notice in Form H shall include an extract from the written award of the Land Administrator in Form G, relating to the land in which the person to whom such notice is addressed has an interest.

[9] Examination of the statement shows the appellant's grievance was not so much the award itself but the acquisition. The objection by the appellant at all times was in respect of the acquisition of part of its land, not the quantum of the award itself. This is evident from the appellant's summary of facts before us:

2.1. The appellant is the registered owner of Lot PT No 2851, 1727, 3165 and 3168 … and has obtained various approvals to develop the land. The surrounding mangrove jungle has also been earmarked for eco-tourism.

2.2. The second respondent is the owner of Lot 33 who wished to build a hotel thereon. In 1994, the second respondent applied to the first respondent to acquire part of the appellant's land in Lot PT No 3168 to construct an access road direct into the second respondent's land.

2.3. By a letter dated 24.7.1997, the State Economic Planning Unit, ('UPEN'), rejected the proposed acquisition to be 5 improper on various grounds including that this proposed acquisition is solely for the purpose of the advantage of the second respondent and there were already access roads to the send Respondent's land.

2.4. On a second letter by UPEN dated 10.2.1998 to the second respondent, UPEN reiterated its position in its letter dated 24.7.1997 in rejecting the second respondent's application for the proposed acquisition on the basis that the proposed access road direct into the second respondent's land is indeed not necessary.

2.5. Sometime between 1999 and 2000, the second respondent made a second attempt to acquire the appellant's land for the same purpose under s 3(1)(b) LAA 1960.

2.6. In subsequent meetings, it was apparent that the second respondent's insistence on the acquisition was to enable it to avoid making any contribution towards infrastructure and maintenance costs of the existing access roads.

2.7. By letter dated 20.8.2001, the appellant was informed by Pejabat Tanah, Kemaman, that Majlis Mesyuarat Kerajaan Negeri ('MMKN') had rejected the second respondent's second attempt acquisition.

2.8. Unknown to the appellant, a third attempt was made to acquire the subject land, this time by declaring that it was required for a public purpose under s 3(1)(a) LAA 1960.

2.9. Form D (a declaration to acquire the land) was published in the *gazette* on 21.7.2005 but this was never served nor notified to the Appellant.

2.10. On 7.3.2006 (some nine months later), the appellant was served with Form E to attend a land enquiry by the Pentadbir Tanah Daerah ('PTD'). The Form E was not appended with a Form D. To date, the appellant had not been served with Form D.

2.11. The appellant wrote protest letters to the first respondent and to the MB's office to stay first respondent's inaction during that period led the appellant to believe that its request/protest for the acquisition to be withdrawn was being resolved between these state government agencies.

2.12. The first respondent subsequently served upon the appellant a notice of award in Form H dated 27.11.2007. This was two years four months after the declaration in Form D was *gazetted*.

2.13. Form H constituted the first respondent's decision to reject the appellant's request that the acquisition be stayed / withdrawn and to proceed with the acquisition by making the award. The appellant rejected the award and filed this application for judicial review against the first respondent's decision.

2.14. On 20.5.2008, the appellant's application for leave for judicial review was allowed.

2.15. On 21.6.2009, the appellant's application for judicial review was dismissed and hence this appeal by the appellant.

[10] We conclude, therefore, that the High Court did not err in sustaining this preliminary objection.

THE SECOND OBJECTION

[11] The second objection, that the state authority was not named as a party

relates directly to the question addressed earlier above. Since it is the decision to acquire that is challenged, that challenge is against the decision of the state authority under s 8 of the LAA 1960.

[12] Since the Land Acquisition Act 1960 is, subject to compensation, legislation that empowers a state authority to deprive a person of his property, its provisions must be adhered to strictly (see *Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor* [2013] 2 MLJ 16; [2013] 3 CLJ 649 (CA). If a power is stated to be with the state authority, it cannot be exercised by another. On the face of it, it appears that it follows that an action cannot be taken against another for the exercise of its power by the state authority. The LAA 1960 only provides that the land administrator acts upon the decision of the state authority to hold inquiry for the hearing of claims to compensation for all interests in such land. An action against the decision of the state authority cannot name the land administrator.

[13] We conclude that the High Court did not err in sustaining the second objection.

CONSEQUENTIAL ASPECTS

[14] It was submitted for the appellant that the learned judge erred in law and in facts in failing to consider that the failure by the first respondent to make and serve an award in Form H within two years on the appellant after Form D was *gazetted* is contradictory to s 8(4) of the LAA 1960 and thereby renders the declaration of acquisition published in the *gazette* on 21 July 2005 (Form D) to lapse, cease, terminate and of no effect.

[15] Section 8(4) of the LAA provides:

> (4) A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the Gazette in so far as it relates to any land or part of any land in respect of which the land administrator has not made an award under subsection 14(1) within the said period of two years, and, accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect.

[16] The two year time frame applies to the award under sub-s 14(1). This latter section provides:

> (1) Upon the conclusion of the enquiry under section 12 relating to any scheduled land the land administrator shall prepare a written award under his hand in Form G, in which he shall, in respect of each separate area of scheduled land, make a separate award in respect of each person whose interest in the land has been established in such enquiry.

[17] On the other hand, Form H that the appellant relies upon is the notice of that award of the land administrator, and containing an extract thereof. Section 16 of the LAA 1960 provides:

> (1) On making any award under subsection 14(1) in respect of any scheduled land the land administrator shall prepare and serve on each person interested in such land a notice in Form H.
>
> (2) Every notice in Form H shall include an extract from the written award of the land administrator in Form G, relating to the land in which the person to whom such notice is addressed has an interest.

[18] We conclude the two year time frame applied to the making of the award in Form G under s 14(1) and not the giving of the notice in Form H under s 16. See *Arthur Ponniah Gurubatham & satu Lagi lwn Pentadbir Tanah Wilayah Persekutuan* [2008] MLJU 728; [2008] 3 CLJ 17. Since the award in Form G was made on 3 August 2006, the first respondent had acted well within the two year time frame from the date of From D, 21 July 2005.

[19] Accordingly, we dismissed the appeal and sustained the preliminary objections with costs RM20,000 to the first respondent and RM10,000 to the second respondent, and ordered the deposit be refunded.

Appeal dismissed.

Reported by Afiq Mohamad Noor